would necessarily demonstrate the invalidity of confinement or its duration."

The *Wilkenson* petitioners' requests for prospective injunctive parole relief, did not affect the underlying charges, and they were permitted to proceed. However, in the case at bar, this petition does challenge the underlying conviction. The Appeals Court was correct.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED, this the 28th day of February, 2006.

Respondents, Frank Ainsworth,
and Copiah County

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(4)

No. 05-999

In the Supreme Court of the United States

HOUSTON COLLINS, JR., et al.,
Petitioners,

v.

HINDS COUNTY SHERIFF'S DEPARTMENT and
RANKIN COUNTY SHERIFF'S DEPARTMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is the favorable termination requirement of *Heck v. Humphrey* applicable to parties who have been convicted of misdemeanors?

2. Should an injunction apply to two sheriffs departments that assisted another sheriff in conducting driver's license checkpoints, if the two assisting sheriff departments are unaware of any improper purpose behind the establishment of the checkpoints?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below:

Plaintiff-Petitioners:

1. Houston Collins, Jr.
2. Sharlet Belton Collins
3. Robert Earl Collins
4. Velma Jean Collins
5. Darrell Calender
6. Larry Valliere
7. Gregory Tolliver
8. Sherman Tolliver
9. Dwayne Kemp
10. Christopher Wong Won
11. Detron Bendross
12. Bernard Vergis
13. Ashley Grundy
14. Eddie Youngblood, III
15. Timothy Vincent Young
16. Priscilla Morris
17. Luther Jefferson
18. Lee Ester Crump
19. Linda Christmas

Defendant-Respondents:

1. Frank Ainsworth
2. Copiah County, Mississippi

STATEMENT REGARDING JURISDICTION

These Respondents do not believe this case is properly before this Court as the issues presented do not involve a genuine conflict of law or questions between the Circuit Courts of Appeal, nor is there a question of broad public interest.

CONSTITUTIONAL PROVISIONS INVOLVED

The underlying action includes issues related to the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§1983 and 1988. However, the matters on appeal to this Court concern only the Fourth Amendment to the United States Constitution, as applied through 42 U.S.C. §1983.

STATEMENT OF THE CASE

The only facts significant to the issues on appeal are confessed by Petitioners Gregory Tolliver, Sherman Tolliver, Larry Valliere, Pricilla Morris and Luther Jefferson. Each of the petitioners was convicted or pled guilty to criminal charges before bringing civil suit. None of the charges were reversed or expunged.

On June 4, 2000, the Petitioners were stopped at a roadblock in Copiah County, Mississippi. Larry Valliere was arrested for driving without a valid driver's license, a misdemeanor. Mr. Valliere pled guilty and paid a fine. (R. 2177) He never challenged his plea. Gregory Tolliver was arrested and charged with contributing to the delinquency of a minor, possession of beer and possession of marijuana. Mr. Tolliver was found guilty of the charges of possession of beer and marijuana. (R. 2031) He did not appeal or challenge this

verdict. Sherman Tolliver was arrested and charged with possession of beer. Deputies also seized his .380 caliber pistol. Mr. Tolliver pled guilty. (R. 2073-2974) He has not challenged or appealed his plea. Pricilla Morris and Luther Jefferson each pled guilty to charges stemming from their arrests, and neither challenged the judgments entered against them. (R. 2131 and R. 2196)

On February 5, 2001, Houston Collins, Jr., Sharlet Belton Collins, Robert Earl Collins, Velma Jean Collins, Darrell Calender, Larry Valliere, Gregory Tolliver, Sherman Tolliver, Timothy Vincent Young, Priscilla Morris, Luther Jefferson, Lee Ester Crump, Linda Christmas, and Dwayne Kemp, Christopher Wong Won, Detron Bendross, Bernard Vergis, Ashley Grundy, Eddie Youngblood, III, individually and as 2 Live Crew (sometimes hereinafter collectively referred to as "Petitioners") filed a complaint alleging civil rights violations including First and Fourth Amendment claims. Additionally, they sought the imposition of preliminary and permanent injunctions to prevent these Respondents from denying, in advance their use of Collins Field (a venue in Copiah County, Mississippi) as a forum for conducting future outdoor concert(s) without enacting proper safeguards. (R. at 2975) The injunction the Petitioners sought was as to all Respondents for any future, yet unplanned events to be held at this Copiah County venue.

On May 22, 2003, the District Court granted several individual Respondents' Motion for Summary Judgment on the grounds of qualified immunity. The Petitioners appealed the District Court's decision. On June 4, 2003, the Fifth Circuit Court of Appeals affirmed the District Court in part, reversed the District Court in part, and remanded the case for further proceedings.

The Hinds County Sheriff's Department and the Rankin County Sheriff's Department (sometimes hereinafter collectively referred to as "these Respondents") filed a Motion to Dismiss or for Summary Judgment on February 28, 2005. On March 15, 2005, following a concession and judicial admission by Petitioners' regarding the absence of liability on the part of these Respondents, the District Court properly granted summary judgment as to all claims, including the claims for a permanent injunction, in favor of these Respondents. (R. at 3055-56)

Despite the Petitioners' admission and confession to the District Court that these Respondents had no liability unto the Petitioners on the merits, the Petitioners appealed the District Court's refusal to impose a permanent injunction upon the Hinds County Sheriff's Department and the Rankin County Sheriff's Department. The Fifth Circuit denied the relief requested by the appeal and affirmed the decisions of the District Court in an Order dated December 12, 2005.

The Petitioners now again raise these same issues in their Writ of Certiorari. Further, the petition for Writ of Certiorari suggests that certain facts not relevant to the issues within the petition are true. They are not. For the purpose of preserving the right to oppose these facts, pursuant to Supreme Court Rule 15(2), the following are contested facts:

1. A sixth arrested defendant, Darrell Callender, who was not dismissed from this action, was not absolved of his crimes, as suggested by the Petitioners. The charges against him were only remanded.

2. The concert was not cancelled by the Sheriff, as suggested by the Petitioners. The concert was cancelled as a result of rain, as determined by concert promoter Sharlott

Collins. (R. 1033). No defendant or deputy cancelled the show. (R. 1013)

3. The purpose of the checkpoint was not improper as argued by the Petitioners. No solicitation of a bribe was ever attempted by any Respondent. (R. 1919). The actions of the defendants were not intended to suppress speech. (R. 1922). Sheriff Ainsworth sought and obtained an attorney's opinion regarding checkpoints before it was held. (R. 935)

SUPPORT FOR THE DENIAL OF PETITIONERS WRIT OF CERTIORARI

I. The Appellate and Trial Courts correctly applied the favorable termination requirement of *Heck v. Humphrey*.

Each of the Petitioners was convicted or pled guilty in criminal proceedings arising out of, or near to, the driver's license checkpoint established by, and located within, Copiah County, Mississippi, on June 4, 2000. None of their criminal convictions were reversed or expunged. These very convictions support the fact the roadblock from which the arrests stem was valid and that any suit brought under 42 U.S.C. §1983 which would challenge or imply the invalidity of those convictions is barred under *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2.d 3 (1994).

In *Heck v. Humphrey*, the United States Supreme Court specifically held that in order for a plaintiff to successfully recover on a § 1983 claim for an allegedly unconstitutional harm that would render a conviction or sentence invalid, (s)he must prove that the conviction or sentence issued to said plaintiff has been reversed, expunged or declared invalid.

When the conviction has not been overturned, the plaintiff's claim is not cognizable under § 1983. *Id.* at 487.

In the matter presently before the Court, the Petitioners were convicted of charges stemming from their arrest at or near the Copiah County, Mississippi, driver's license checkpoint. All charges stemming from the arrest were the product of this stop.

The Petitioners argue that their Petition for Writ of Certiorari should be granted pursuant to dicta and dissent within *Spencer v. Kemna*, 522 U.S. 1 (1998). However, this case does not develop out of the same situations as those in *Spencer,* and therefore the dicta and dissent in *Spencer* are not applicable. At issue in *Spencer* was the constitutionality of an order revoking probation and did not challenge the Petitioner's underlying conviction. The dicta and dissent which the Petitioners in this case rely upon never turned to the settled question in *Heck*. In *Spencer*, even if the Court had not found the question moot, the resolution would not have created the potential for a divergent result or a finding that the underlying criminal conviction was invalid. Thus, the Fifth Circuit, in this instance, correctly applied the Supreme Court's holdings in *Heck* and *Spencer*.

Further, the Petitioners in the present case argue that a conflict exists between the Circuit Courts of Appeal on the application of *Heck v. Humphrey*, suggesting that some jurisdictions do not require a favorable termination of the criminal action before the filing of a suit under 42 U.S.C. §1983.

The Petitioners concede that the Fifth Circuit follows the termination requirement as described in *Randall v. Johnson*, 227 F. 3d 300 (2000), where an inmate who was no longer in

custody was unable to recover under 42 U.S.C. §1983, absent a showing that an authorized tribunal had overturned or otherwise expunged his conviction. *Id.* The Petitioners also acknowledge that several other circuits follow this line of authority.

To demonstrate a difference in opinion between the circuits, the petitioners cite *Jenkins v. Haubert*, 179 F. 3d 19 (2d Cir. 1999); *DeWalt v. Carter*, 224 F. 3d 607 (7th Cir. 2000); *Abusai v. Hillsburough*, 405 F. 3d 1298 (11th Cir. 2005); and *Brown v. Plaut*, 131 F. 3d 163 (D.C. 1997). None of these cases implicate the validity of facts surrounding conviction. In the case of *Muhammad v. Close*, 450 U.S. 749 (2004), the Supreme Court has addressed the conflict which existed within the Circuits, where the fact or duration of sentence was not implicated.

Muhammad appealed to the United States Supreme Court, after the Sixth Circuit Court of Appeals held the action was barred by *Heck* because Muhammad had sought, among other relief, the expungement of a misconduct charge from his prison record. The Court stated:

> "...Relying upon Circuit precedent, see *Huey v. Stine*, 230 F. 3d 226 (2000), the Court of Appeals held that an action under Sec. 1983 to expunge his misconduct charge and for other relief occasioned by the misconduct proceedings could be brought only after satisfying *Heck's* favorable termination requirement. The Circuit thus maintained a split on the applicability of *Heck* to prison disciplinary proceedings in the absence of any implication going to the fact or duration of underlying sentence, four Circuits having taken the contrary view. See *Leamer v. Fauver*, 288 F.3d 532, 542, 544 (CA3 2002); *DeWalt v. Carter*,

224 F.3d 607, 613 (CA7 2000); *Jenkins v. Haubert*, 179 F.3d 19, 27 (CA2 1999); *Brown v. Plaut*, 131 D.3d 163, 167, 169 (CADC 1997). ..." *Id.*

Because the *Muhammad* petitioner, by amendment, did not seek to invalidate the underlying conviction, that case was remanded for rulings consistent with the facts as pled. However, the nature of the conflict between the Circuits was clear. A conflict between Circuits may have existed in regard to applying *Heck* to *post conviction probation* issues, but not as to the underlying criminal convictions.

In 2005, the question of the validity of *Heck* was brought before this Court in the case of *Wilkinson v. Dotson*, 544 U.S. 74 (2005). This Court clearly held that suits for damages or injunction are controlled by *Heck* reasoning, and only where a result would not invalidate the conviction may it proceed. The Court held:

"...*Heck* specifies that a prisoner cannot use §1983 to obtain damages where success would necessarily imply the unlawfulness of a (not previously invalidated) conviction or sentence. And *Balisok*, like *Wolff*, demonstrates that habeas remedies do not displace §1983 actions where success in the civil rights suit would not necessarily vitiate the legality of (non previously invalidated) state confinement. These cases, taken together, indicate that a state prisoner's §1983 action is barred (absent prior invalidation)-no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)-if success in that action would

> necessarily demonstrate the invalidity of confinement or its duration."

Wilkinson, 544 U.S. 74 (2005).

The *Wilkinson* petitioners' requests for prospective injunctive parole relief did not affect the underlying charges, and they were permitted to proceed. However, in the case at bar, this petition *does* challenge the underlying conviction. Thus, the Fifth Circuit Court of Appeals was correct and this issue should not again need to come before the United States Supreme Court.

II. The imposition of an injunction against the Hinds and Rankin County Sheriff's Departments should not be issued, as these Petitioners have been precluded by judicial estoppel from arguing for injunctions against these Respondents and there is no support in law, fact or public interest for any injunction against them.

A. These Respondents have been dismissed with prejudice and the petitioners are judicially estopped from arguing for injunctions against these Respondents.

The Petitioners claim that they are entitled to an injunction to prevent these Respondents from denying them, in advance, from using Collins Field in Copiah County, Mississippi, as a forum for conducting an outdoor concert, without enacting proper safeguards. (R. at 2975).

Neither the Hinds County Sheriff's Department or the Rankin County Sheriff's Department have jurisdiction to deny the use of this field, and the Petitioners confessed to the District Court that neither could possibly be liable unto the

Petitioners. Accordingly, on March 15, 2005, the District Court dismissed the Hinds County Sheriff's Department and the Rankin County Sheriff's Department from this case, with prejudice.

The Petitioners' claim that an injunction can be imposed against these Respondents directly conflicts with their earlier representations to the lower courts and the subsequent dismissal of these Respondents on the merits. The District Court clearly took the Petitioners' position and admission into consideration when dismissing these two sheriff's departments on the merits, as evidenced by the court's direct *reference to Petitioners concession that no liability exists against these Respondents in its March 15, 2005, Order*. (R. at 3055). The Petitioners are judicially estopped from adopting on appeal the clearly inconsistent judicial position that an injunction could be and should be issued against these Respondents.

B. There is no support for an injunction against the Hinds County Sheriff's Department or the Rankin County Sheriff's Department in case law or public interest.

In their Writ of Certiorari, the Petitioners seek injunctive relief as to two sheriff's departments that have not only been dismissed from the case on the merits, but do not have independent jurisdiction in the county where the incident of issue occurred and do not have authority within that county aside from what is granted by the county itself. The Petitioners are not seeking to conduct any future activity in either Hinds or Rankin Counties, wherein these two sheriffs' departments have jurisdiction. Collins Field, the area for which the petitioners sought protection through an injunction is located in *Copiah County*. Neither the Hinds County

OPPOSITION BRIEF

Sheriff's Department nor the Rankin County Sheriff's Department establishes custom, policy, or procedure in the county where Collins Field is located. Mississippi statutes, like the common law, confine the authority and duties of the sheriff to the county for which he was elected. *McLean v. State of Mississippi ex. rel. Roy*, 96 F.2d 741, 744-45 (5th Cir. 1938). The injunction being sought against these Respondents is not only for future actions towards which these Respondents have shown no predisposition or intent but also centered upon hypothetical future events in a location, outside of Hinds' or Rankin's enforcement jurisdiction.

In order to have a preliminary injunction the following requisites must be met:

> A preliminary injunction is an extraordinary equitable remedy that may be granted only if the plaintiff establishes four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest.

Sunbeam Products, Inc. v. West Bend Co., 123 F.3d 246, 250 (5th Cir. 1997) (citation omitted) (overturned on other grounds). The requirements for the imposition of a permanent injunction are essentially the same as for a preliminary injunction, except the petitioners must show actual success on the merits. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 107 S.Ct. 1396, 94 L. Ed. 2d. 542, 546 (1987). These Respondents were dismissed with prejudice by the District Court, and Petitioners cannot and did not have actual success on the merits with regard to any

claims against these two entities. Accordingly, their motion for a permanent injunction was properly denied by the lower courts.

As was acknowledged by counsel for the Petitioners' during oral argument on the Defendant-Respondents' Motion for Summary Judgment, the alleged injuries which the Petitioners complained of did not occur because of any action or omission or as the result of a custom, policy, or practice of either of these Respondents. (R. at 6, R. at 1669, R. at 3055-56). Similarly, the events complained of did not occur within either Hinds County or Rankin County, Mississippi These Respondents made clear that there is no custom, policy, or practice which resulted in the supposed injuries suffered by the Petitioners. (R. at 1605, R. at 1647-48). None of the Petitioners identified or established any actionable behavior on the part of these Respondents. Significantly, the Petitioners acknowledged that any members of the Hinds County Sheriff's Department and the Rankin County Sheriff's Department who responded to Sheriff Ainsworth's call for assistance were deputized by the Sheriff into the Copiah County Sheriff's Department. (R. at 2979). Individually, the extent of any of the Petitioners' allegations against either of these Respondents was that their employees, *after being deputized to act for another sheriff's department*, participated in checking to make sure the operators of motor vehicles held a proper license. The Petitioners have acknowledged that any actions which could have been taken by either the Hinds or Rankin County Sheriff's Departments would have been on behalf of the Copiah County Sheriff's Department (and, axiomatically, not on behalf of Hinds or Rankin) which had deputized them into its force and was supervising and directing any deputized officers.

Petitioners have failed to show that there is any substantial threat that they will suffer irreparable injury if an injunction is not issued against these Respondents. There is no substantial risk that any custom, policy or practice of these Respondents may lead to an injury to the Petitioners, given that the petitioners acknowledged that the injuries they supposedly suffered were not the result of any action, omission, or custom, policy, or practice of the Hinds County Sheriff's Department or the Rankin County Sheriff's Department nor is there any evidence of conspiracy or anticipated future concentrated action. (R. at 6). This Court has made clear that the mere loss of income does not constitute irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90-92, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). Here, the Petitioners simply allege that they will lose the opportunity for profit if the request for an injunction is denied. As to the Hinds and Rankin County Sheriff's Departments, this is clearly not true since neither department has jurisdiction in the venue at issue. Further, where a party cannot demonstrate that a harm will occur which cannot be compensated for by money damages, the party cannot satisfy the requirement of irreparable harm necessary to sustain injunctive relief. The Petitioners have not shown that the denial of injunction would cause them to suffer any injury let alone one which could not be compensated by a monetary award. Therefore, there is no need or justification for the imposition of an injunction against either the Hinds County Sheriff's Department or the Rankin County Sheriff's Department.

The Petitioners made a conclusory allegation that one of the Petitioners will suffer irreparable injury because she plans to have future concerts at the subject venue *in Copiah County, Mississippi*. Disregarding the fact that money damages would be able to fully compensate her for any supposed injury, the

Petitioners have specifically disavowed that any action, omission, or custom, policy, or practice resulted in the alleged injuries supposedly suffered by the petitioners. (R. at 6, R at. 3055). This position was demonstrated throughout the discovery process. When asked who was the *sole* policy-maker concerning the complained of driver's license checkpoints, Sheriff Ainsworth made it abundantly clear that he was the only person making decisions concerning the existence and operation of the driver's license checkpoints. (R. at 1669). In addition, Sheriff Ainsworth stated that he deputized all law enforcement personnel from other jurisdictions, making them members of the Copiah County Sheriff's Department during the course of their actions on June 4, 2000. (R. at 1670). Any alleged participation by employees of the Hinds County Sheriff's Department or the Rankin County Sheriff's Department was necessarily performed on behalf of Copiah County, Mississippi, after they were deputized for the Copiah County Sheriff's Department. The Copiah County Sheriff's Department, in responding to Interrogatories propounded by the Petitioners, stated that Sheriff Frank Ainsworth is the only person who gave any instructions concerning the driver's license checkpoints. (R. at 1650). It has repeatedly been made obvious during discovery that neither the Hinds County Sheriff's Department, the Rankin County Sheriff's Department, nor any of their employees played any part in the formulation or implementation of the custom, policy, or practice which allegedly resulted in injury to the petitioners. These Respondents had no knowledge of any improper purpose and had no intentions of supporting any improper purpose. It is not possible that they create a substantial risk, now or in the future, to the Petitioners.

In their Writ of Certiorari the Petitioners argue that the imposition of an injunction against these Respondents is

proper because members of both the Hinds County Sheriff's Department and the Rankin County Sheriff's Department assisted the Copiah County Sheriff's Department. Of critical importance to this matter is that the Respondents acted only after being deputized by Copiah County. (Interestingly, Petitioners do no seek injunctions against any of the other entities that assisted Copiah County which and were also dismissed upon summary judgment by the District Court.) All actions that were taken were in Copiah County, under the direction and as part of of the Copiah County Sheriff's Department. To issue an injunction against these particular Respondents would not serve the public interest. Rather, it is in the public interest to for departments to assist their neighbors in public safety and law enforcement matters. An injunction in a situation such as this one would chill and discourage departments from assisting others in lawful and permissible, and potentially critical, law enforcement activities.

C. There is not a conflict between the Circuits as to the issuance of an injunction against law enforcement departments who assist other departments without knowledge of any problematic purpose.

Petitioners Writ for Certiorari contends that the Fifth Circuit's ruling that these Respondents' lending of deputies to Copiah County is insufficient for an injunction is in conflict with other Circuit court holdings, and thus ripe for adjudication before the U.S. Supreme Court. It is not. The only conflict between the Circuits cited by the Petitioners is the alleged conflict between the Fifth Circuit ruling in the underlying case and the ruling of the United States Court of Appeals for the Eleventh Circuit in *Council for Periodical Distributors Associations v. Evan*, 827 F.2d 1483 (11th Cir.

1987). However, contrary to the Petitioners' assertions, these two cases are not the same. In *Council for Periodical Distributors Association*, the City of Montgomery, Alabama, and its police chief had assigned a city police officer to assist the Montgomery County District Attorney in his efforts to form a task force whose purpose was to block the sale of allegedly obscene magazines in his jurisdiction, which included the City of Montgomery. *Council for Periodical Distributors Associations*, 827 F.2d 1483, at 1485, (11th Cir. 1987). At the request of the District Attorney, the Chief of Police for Montgomery assigned a city police officer to join the task force. *The City of Montgomery was aware of the purpose of the task force at its inception and the officer assigned to the task force was present at a meeting wherein the District Attorney threatened prosecution for the continued sale of the magazines in issue*. Unlike the Hinds and Rankin County Sheriff's Departments, the City of Montgomery was aware of a clearly intended prior restraint *before* participating in the task force. Unlike the City of Montgomery, the Hinds County and Rankin County Sheriff's Departments did not engage in the coordination of, nor have any general knowledge of a problematic purpose or prior restraint connected to the roadblocks for which they were temporarily deputized. Further, the Petitioners in the present case were convicted of the very offenses which the roadblocks were, to the knowledge of these Respondents, set up to address. To compare these Respondents with the City of Montgomery, an entity that was actively involved in the planning and participation of a prior restraint, is not proper. These two cases are not similar and there is not a dispute between Circuits in this matter.

III. Request for Damages

The Hinds County and Rankin County Sheriff's Departments seek awards of damages from the Petitioners for the filing of a clearly frivolous appeal as to these two Respondents. The Supreme Court Rules provide that where a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. S. Ct. Rule 42.2.

A frivolous appeal is one presenting no justiciable question or one so readily recognizable as devoid of merit on the face of the record that there is little if any prospect that it can ever succeed. *Clifford v. Eastern Mortgage & Security Co.*, 166 So. 562, 123 Fla. 180 (Fla. 1936).

The Petitioners have brought an appeal before this Court for an injunction against the Hinds and Rankin County Sheriff's Departments despite the fact both of these Respondents have been dismissed on summary judgment. The Petitioners themselves have acknowledged to the lower courts that no liability exists as these two departments, thus the possibility of any success on the merits against these departments is not merely unlikely, but assuredly so. As these Departments have no liability and an injunction is not appropriate, the judgment of the lower courts should be upheld.

When a judgment is affirmed by the United States Supreme Court or a United States Court of Appeals, the court, in its discretion, may adjudge to the prevailing party just damages for that party's delay, and single or double costs. 28 USCA § 1912. In *Roussel v. Hutton*, 638 So.2d. 1305 (Miss. 1994) the sanctions were lured against an

appellant against whom summary judgment had been entered at trial. The appellant had been found to have no hope of success on appeal and the appeal was considered, therefore, to be frivolous. Similarly, the Petitioners in this case have no hope of success on appeal and their Writ of Certiorari, as brought against the Hinds and Rankin County Sherriff's. The Departments are frivolous. Accordingly, damages are warranted.

CONCLUSION

The Petitioners have failed to show that success on the merits or any potential thereof; in fact, the Petitioners have expressly confessed to the District Judge that there is no basis for the imposition of liability against the Hinds County Sheriff's Department or the Rankin County Sheriff's Department. The Petitioners are now judicially estopped from arguing otherwise. The Petitioners did not show they will suffer irreparable injury if an injunction is not granted, and an imposition of an injunction would actually be contrary to, not for, the public interest. For all these reasons, and because there is no conflict between the Circuit Courts of Appeal, Petitioners' Writ of Certiorari should be denied with an award of damages to these Appellees.

RESPECTFULLY SUBMITTED, this the 10th day of March, 2006.

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Appellees/Defendants,
HINDS COUNTY SHERIFF'S DEPARTMENT AND RANKIN COUNTY SHERIFF'S DEPARTMENT

(3)

No. 05-999

In The
Supreme Court of the United States

HOUSTON COLLINS, JR.; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP, CHRISTOPHER WONG WON, DETRON BENDROSS, BERNARD VERGIS, ASHLEY GRUNDY, and EDDIE YOUNGBLOOD, III, individually and a.k.a 2 Live Crew; TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; and LINDA CHRISTMAS,

Petitioners,

vs.

FRANK AINSWORTH; COPIAH COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; COPIAH COUNTY, MISSISSIPPI; HINDS COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; and RANKIN COUNTY, MISSISSIPPI SHERIFF DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY

Since *Spencer v. Kemna*, 523 U.S. 1 (1998), in which five Justices expressed their views that *Heck v. Humphrey*, 512 U.S. 477 (1994), does not apply to plaintiffs who are not in custody and therefore have no remedy under the habeas statute, there has been open disagreement among the circuits on this issue. This Court should grant certiorari to resolve this unsettled, important question.

1. Respondents try to distinguish the circuit court cases cited by Petitioner in order to argue that there is no conflict among the circuits on the question presented.[1] In particular, they point out that in *Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999), *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000), *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d 1298 (11th Cir. 2005), and *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997), the plaintiffs were not challenging facts surrounding their underlying convictions. However, Respondents ignore that in the three of these cases that were decided after *Spencer*, the court explicitly cited the views of the five concurring and dissenting Justices in *Spencer* in holding that 42 U.S.C. § 1983 was available to the plaintiffs. *See Abusaid*, 131 F.3d at 1315 n.9 (pointing out that five justices in *Spencer* "expressed the view that 42 U.S.C. § 1983 claims are barred only when the alternative remedy of habeas relief is available"); *DeWalt*, 224 F.3d at 616-17 (expressing

[1] Respondents also disagree with certain facts contained in the Petition that are not germane to the question for review. However, there is record evidence to support the facts. The case is before the Court on Respondents' motions for summary judgment. Therefore, the record evidence is to be viewed in the light most favorable to Petitioners. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

hesitancy to "apply the *Heck* rule in such a way as would contravene the pronouncement of five sitting justices"); *Jenkins*, 179 F.3d at 27 (finding that applying the *Heck* rule under the circumstances would "contravene the pronouncement of five justices that some federal remedy – either habeas corpus or 1983 – must be available").

Moreover, although Respondents attempt to downplay the conflict by picking it apart case-by-case, the conflict between the circuits is not limited to the cases cited in the Petition and their particular facts. In cases involving the duration of confinement, the Second, Seventh, and Ninth Circuits all found that *Heck*'s favorable termination requirement did not bar 1983 actions by former prisoners who, because they were no longer in custody, did not have habeas relief available to them. *See Nonnette v. Small*, 316 F.3d 872, 877 (9th Cir. 2002); *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65, 74-75 (2d Cir. 2001). And in *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999), in which the plaintiff was convicted of driving while impaired, and was fined but not imprisoned, the Second Circuit permitted the plaintiff to bring a 1983 action claiming he was subjected to selective prosecution. The court held *Heck* did not apply because the Petitioner was not, and never was, in custody. *Id.* These cases all conflict with the decision below and with the other cases cited in the Petition that hold that *Heck* bars 1983 actions that go to the fact or duration of conviction, even when habeas relief is not available to the plaintiff. *See Torres v. Fauver*, 292 F.3d 141, 145 n.5 (3d Cir. 2002) (acknowledging split between the circuits).

2. Because Respondents frame the conflict in the circuit courts as being over whether *Heck* barred 1983 actions that do not involve the fact or duration of the

underlying conviction, they contend that *Muhammad v. Close*, 450 U.S. 749 (2004), which held that *Heck* was not implicated by a prisoner's challenge that did not have consequences for the fact of conviction or duration of the sentence, resolved the conflict. *Muhammad*, however, did not answer the question presented here. To the contrary, in *Muhammad*, the Court specifically noted that "[m]embers of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement" but found that "this case is no occasion to settle the issue." *Id.* at 752 n.2. The present case provides the occasion to settle the issue left open in *Muhammad*.

3. In *Spencer v. Kemna*, five justices, four in concurrence and one in dissent, stated that the favorable termination requirement of *Heck v. Humphrey* does not bar a plaintiff who is not in custody from bringing a 1983 action. In their Brief in Opposition, Respondents attempt to distinguish the concurrences and dissent in *Spencer v. Kemna* on the ground that the petitioner in *Spencer* was challenging an order revoking probation, rather than conduct that implicated his underlying conviction. However, the five Justices who opined in *Spencer* that the petitioner could bring a 1983 action did not base their views on the fact that Spencer was challenging his parole revocation rather than his original conviction, but on the fact that because Spencer was no longer in custody, he did not have a remedy under the habeas statute. *Spencer*, 523 U.S. at 20-21 (Souter, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting). They believed that the favorable termination requirement does not apply if federal habeas relief is unavailable to a § 1983 plaintiff. Respondents do not dispute that federal habeas relief is unavailable to

§ 1983 plaintiffs, such as the plaintiffs here, who are convicted of a misdemeanor and sentenced to pay a fine only. Thus, according to the views expressed by the five Justices in the concurrences and dissent in *Spencer*, the plaintiffs in this case should have been able to bring a 1983 action to challenge respondents' unconstitutional actions.

4. Finally, Respondents' claim that *Wilkinson v. Dotson*, 544 U.S. 74, 125 S. Ct. 1242 (2005), settled "any ambiguity" about the "validity of *Heck*." However, the validity of *Heck* is not in question, and petitioners certainly do not challenge its application in many instances. Rather, the question is whether the favorable termination requirement in *Heck* applies when habeas is unavailable, an issue not addressed in *Wilkinson*. *Wilkinson* described *Heck* as barring a § 1983 action challenging the validity of a conviction by "a prisoner in state custody." *Id.* at 1245. It did not answer the question whether *Heck* applies if a person was not a state prisoner in custody when he or she filed the § 1983 action. Indeed, *Wilkinson* refers to the *Heck* line of cases as "the implicit habeas exception" to a § 1983 remedy, *id.* at 1248, suggesting that *Heck* may only apply when habeas relief is available.

Furthermore, the Court held in *Wilkinson* that "prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement," *Wilkinson*, 125 S. Ct. at 1249, and held that a state prisoner's § 1983 action for injunctive relief that did not necessarily challenge the validity of the prisoner's sentence was not barred by *Heck*. In the present case, the five convicted petitioners as well as the 14 petitioners who were not convicted sought injunctive relief from the prior

restraint by the Copiah County sheriff on their exercise of the First Amendment freedoms of speech, expression, and association. Any injunctive relief granted to them would not necessarily invalidate any misdemeanor convictions and therefore, under Wilkinson, those § 1983 claims should not be barred.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment and opinion of the United States Court of Appeals for the Fifth Circuit should be reversed.

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